

U.S. Court, U.S.
FILED



05-320 AUG 31 2005

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD P. HAMRIC,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ of Certiorari
To The Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Richard P. Hamric
2720 Hope Street
Sarasota, Florida 34231
941/504-0229
Pro Se Motion

QUESTION(S) PRESENTED

Whether the Court of Appeals erred when it affirmed the District Court's decision not to grant an evidentiary hearing, although that decision conflicts with this Court's decision in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2D 770 (1963), and *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed. 2D 136 (1977), and the Eleventh Circuit's decision in *Smith v. Singleton*, 170 F. 3D 1051 (11th Cir. 1999).

LIST OF PARTIES

- (X) All parties appear in the caption of the case on the cover page and a copy of this petition has been served on all parties or their attorney(s).
- () All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For case from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix **C & D** to the petition and is:

reported at _____;
or,

has been designated for publication but is not yet reported; or,

is unpublished.

The opinion of the United States district court appears at Appendix **A & B** to the petition and is:

reported at _____; or,

has been designated for publication but is not yet reported; or

is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and is:

reported at _____; or,

has been designated for publication but is not yet reported; or,

does not apply.

JURISDICTION

(X) For cases from federal courts:

The dates on which the United States Court of Appeals decided my case were **April 27, 2005** and **June 6, 2005**, pursuant to its jurisdiction under 28 U.S.C. § 3231.

- No petition for rehearing was timely filed in my case.
- (X)** A timely petition for rehearing was denied by the United States Court of Appeals on the Following date: **June 6, 2005**, and a copy of the order denying rehearing appears at Appendix D.
- An extension of time to file the petition for a writ of certiorari was granted to and including

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

() For cases from state courts:

The date on which the highest state court decided my case was _____, and a copy of that decision appears at Appendix _____.

- A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
 An extension of time to file the petition for a writ of certiorari was granted to and including _____ on _____, a copy of the order appears at Appendix _____.
(X) Does not apply.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1275(a).

REASON FOR GRANTING THE WRIT

1. Because the district court's decision not to grant an evidentiary hearing, and the court of appeals' affirmation of the same, is in conflict with this court's decisions in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 136 (1963), and *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 162, 52 L.Ed.2d 136 (1977), and the Eleventh Circuit's decision in *Smith v. Singleton*, 170 F.3d 1051 (11th Cir. 1999).

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TABLE OF AUTHORITIES

Cases:	Pages:
<i>Blackledge v. Allison</i> , 431 U.S. 63, 97 S.Ct. A-1, 52 L.Ed. 2d 136 (1977)	(i), (v), 3
<i>Cuyler v. Sullivan</i> , 466 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed. 2d 33 (1980)	3
<i>Massaro v. United States</i> , 538 U.S. 500, 123 S.Ct. 1690 155 L.Ed. 2d 714 (2003)	2
<i>Smith v. Singleton</i> , 170 F. 3d 1051 (11th Cir. 1999)	(i), (v)
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	2, 3
<i>Townsend v. Sain</i> , 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)	(i), (v)

STATUTES AND RULES

28 U.S.C. § 1254(1)	(iv)
28 U.S.C. § 2255	(i), 2
28 U.S.C. § 3231	(iv)

STATEMENT OF CASE AND FACTS

In December of 1995, Richard P. Hamric was named in a twenty-count indictment charging him with five counts of mail fraud, five counts of bank fraud, and ten counts of money laundering. After pretrial proceedings, on January 28, 1998, Hamric entered a guilty plea to one count of mail fraud and one count of money laundering pursuant to a plea agreement. On May 21, 1998, Hamric was sentenced to 87 months imprisonment, 36 months supervised release, and a \$100 special assessment. Hamric filed a direct appeal, and his conviction and sentence were affirmed by the Eleventh Circuit Court of Appeal on May 30, 2002. Hamric filed a timely § 2255 motion on June 23, 2003.

On October 29, 2003, the United States filed AN OPPOSITION to Hamric's motion to vacate, set aside, or correct sentence. On February 4, 2004, Hamric filed a REPLY BRIEF to the opposition. The District Court denied Hamric's § 2255 motion on November 16, 2004. **Appendix A.**

Richard P. Hamric filed a timely NOTICE OF APPEAL and REQUEST FOR CERTIFICATE OF APPEALABILITY. The motion for CERTIFICATE OF APPEALABILITY was denied, by ORDER of the District Court entered on December 20, 2004. **Appendix B.** Thereafter, Hamric requested the Eleventh Circuit Court of Appeals to issue a CERTIFICATE OF APPEALABILITY. The REQUEST was denied by Order entered on April 27, 2005. **Appendix C.**

Richard P. Hamric filed a timely MOTION TO RECONSIDER, the motion was denied on June 6, 2005. **Appendix D.** Therefore this is a timely motion for a Writ of Certiorari.

ARGUMENT AND MEMORANDUM OF LAW

Richard P. Hamric argues that the Order of the Court of Appeals for the Eleventh Circuit, is in conflict with this court's precedent and its own circuit law.

Mr. Hamric raised six claims in his § 2255 motion: (1) that his trial attorneys (Howard Freidin & Carl Lida) were constitutionally ineffective, in violation of the Sixth Amendment of the United States constitution, due to conflict of interest; (2) that his appellate attorney (Marcia Shein) provided ineffective assistance of counsel when she failed to raise the conflict of interest claim on direct appeal; (3) that Carl Lida provided ineffective assistance of counsel due to his failure to adequately investigate and prepare for trial; (4) that Marcia Shein provided ineffective assistance of counsel (on direct appeal) when she failed to raise the issue of his trial attorney's (Mr. Lida) failure to investigate and prepare for trial; (5) that his guilty plea was the result of coercion and a lack of knowledge concerning his legal inability to appeal pretrial rulings; and (6) that his appellate attorney (Marcia Shein) provided ineffective assistance when she failed to raise the claim of an involuntary and unknowing guilty plea.

Issue of ineffective assistance of counsel can be raised in a § 2255 proceeding even where petitioner could have raised the issues on direct appeal but failed to do so. Massaro v. United States, 538 US 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). The Supreme Court established a two-part test for determining whether a convicted person is entitled to habeas relief on the ground that his or her counsel rendered ineffective assistance: (1) whether counsel's representation was deficient, i.e., "fell below an objective standard of reasonableness;" and (2) whether the deficient performance prejudiced the defendant, i.e., there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 US 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Nevertheless, this Court holds that a habeas petitioner is not required to prove his claim of ineffective assistance of counsel prior to an evidentiary

hearing. See, Blackledge v. Allison, 431 US 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

There are two methods by which Hamric may establish his ineffective assistance of counsel claim. **First**, Hamric may proceed under the traditional Strickland standard and show "that counsel's performance fell below reasonable professional standards" and "that Hamric was prejudiced by his attorney's substandard performance." Strickland v. Washington, 466 US at 687-88. **Secondly**, at issue here, Hamric may proceed under Cuyler v. Sullivan, 466 US 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 33 (1980), and show "that an actual conflict of interest adversely affected his counsels' performance, which excuses the need to show prejudice.

Under the Cuyler framework, to establish ineffective assistance of counsel Hamric must show that (1) his counsels had an actual conflict of interest and (2) the conflict adversely affected his counsels' performance. Cuyler, 466 US 348-50. This requires Hamric to point to specific instances (in the record) to (suggest) an actual conflict or impairment of his interests and (to demonstrate) that his attorneys made a choice between possible alternative course(s) of action. With that being said, this Court need to review the facts relating to the conflict very carefully.

First, the chronology of Hamric's representation by various counsel is fairly extensive; however, only a brief review is necessary to place the conflict of interest issue in context. Hamric retained attorney Howard Freidin (Mr. Freidin) to represent him, and Mr. Freidin entered a Notice of Appearance on March 26, 1996, then he withdrew in July, 1996 and then on August 7, 1996 filed Stipulation For Substitution Of Counsel and once again became Hamric's trial counsel. Then, after being prompted by Mr. Freidin, Hamric also retained attorney Carl Lida (Mr. Lida), and Mr. Lida filed his Notice of Appearance on September 20, 1996. Unbeknowning to Hamric at the time he retained Mr. Lida, Mr. Freidin had become the subject of a criminal investigation by the same U.S. Attorney's Office which was prosecuting Hamric.

However, from the very beginning, Mr. Freidin proved himself an aggressive attorney. On September 24, 1996,

he filed numerous sealed documents. Mr. Freidin also filed numerous other pretrial motions, including a motion to dismiss various counts of the indictment, motions relating to the discovery procedures instituted by the prosecution, and their lack of disclosures to the defense. Off-the-record, Hamric and Mr. Freidin discussed possible witnesses for his defense. Hamric informed Mr. Freidin that, April Wright, Barbara Cook, Donald Y. Bennett, Russell Knight, Betty McCue, Richard Miller, Carlos Beruff, Brenda Keating and Ken Keating were important witnesses that could aid in his defense.

Mr. Freidin interviewed, or attempted to interview, several of the witnesses. Mr. Freidin was told, by more than one of the expected witnesses that he or she was unaware of any illegal activities by Hamric. Also, some of the witnesses confirmed to Freidin that they recalled an audit being performed on Select Title Associates records by Old Republic/Minnesota Title at a critical time "in the defense time line". Old Republic/Minnesota Title maintained the audit had not occurred while obviously denying the existence of an audit report which was central to Hamric's defense.

Mr. Freidin and Hamric reviewed numerous documents belonging to Minnesota/Old Republic Title Insurance Company and their agent, Select Title Associates, Inc. The documents showed that Select Title Associates, Inc. protected its clients from "cash flow" financial problems by issuing title insurance which "falsely" indicated that there were either no pre-existing liens, or that existing liens had been paid off prior to or at the time of closing; when in fact the liens were not paid.

Further, the documents contained exclusive evidence that Minnesota/Old Republic Title Insurance was aware of the manner in which Select Title Associates, Inc. protected its clients from financial problems. It is essential to recognize the importance to Hamric's defense the fact of Freidin's first person knowledge of the existence of exculpatory documents and awareness of witnesses to the audit being performed.

Dorthy Weil, Founder, Majority Shareholder and President of Select Title Associates, Inc., had previously been employed at First American Title Insurance. The documents reviewed